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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/844,153	04/27/2001	Vadim Eydelman	209053	1777

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MICROSOFT CORPORATION
ATTN: PATENT GROUP DOCKETING DEPARTMENT
ONE MICROSOFT WAY
REDMOND, WA 98052-6399

EXAMINER	
TRAN, PHILIP B	
ART UNIT	**PAPER NUMBER**
2155	

DATE MAILED: 06/16/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/844,153	EYDELMAN ET AL.	
	Examiner	Art Unit	
	Philip B. Tran	2155	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *31 January 2005*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-37* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-37* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Double Patenting

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 1-37 of the instant application (09/844,153) are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 9-19 of U.S. Pat. No. 6,658,469. Although the conflicting claims are not identical, they are not patentably distinct from each other because of reasons set below:

Regarding claims 1-37, claims 9-19 of U.S. Pat. No. 6,658,469 contain every element of claim 1-37 of the instant application (09/844,153) and as such anticipate claim 1-37 of the instant application.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

"A later patent claim is not patentably distinct from an earlier patent claim if the later claim is obvious over, or anticipated by, **the earlier claim. In re Longi, 759 F.2d at 896, 225 USPQ at 651 (affirming a holding of obviousness-type double patenting because the claims at issue were obvious over claims in four prior art patents); In re Berg, 140 F.3d at 1437, 46 USPQ2d at 1233 (Fed. Cir. 1998) (affirming a holding of obviousness-type double patenting where a patent application claim to a genus is anticipated by a patent claim to a species within that genus). " ELI LILLY AND COMPANY v BARR LABORATORIES, INC., United States Court of Appeals for the Federal Circuit, ON PETITION FOR REHEARING EN BANC (DECIDED: May 30, 2001).**

Claim Rejections - 35 USC § 102

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

4. Claims 1-2, 16, 19-20 and 35 are rejected under 35 U.S.C. 102(e) as being anticipated by Kompella et al (Hereafter, Kompella), U.S. Pat. No. 5892754.

Regarding claim 1, Kompella teaches a method to transfer data from a sending application to a receiving application in a computer environment having a plurality of data transfer modes and at least one system area network, the method comprising detecting a transfer behavior of the receiving application and switching the data transfer mode to one of the plurality of data transfer modes based upon the transfer behavior (= detecting changes in the transmission parameters and changing modes of transmission requiring different transmission parameters) [see Col. 9, Line 56- Col. 10, Line 7].

Regarding claim 2, Kompella further teaches the method of claim 1 further comprising the step of transferring data in one of the data transfer modes [see Col. 9, Line 56- Col. 10, Line 7].

Regarding claim 16, Kompella further teaches the method of claim 1 wherein the step of detecting the transfer behavior comprises the step of detecting whether an initial data block and a subsequent data block has been transferred within a predetermined time (= determining observation interval timer) [see Fig. 4 and Col. 7, Lines 28-49].

Claims 19-20 are rejected under the same rationale set forth above to claims 1-2, respectively.

Claim 35 is rejected under the same rationale set forth above to claim 16.

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

6. Claim 7-11, 17-18, 25-27, 33-34 and 36-37 are rejected under 35 U.S.C 103(a) as being unpatentable over Kompella et al (Hereafter, Kompella), U.S. Pat. No. 5,892,754 in view of Scott et al (Hereafter, Scott), U.S. Pat No. 5,748,900.

Regarding claims 7-8, Kompella does not explicitly teach the step of switching the data transfer mode based upon the transfer behavior comprises the step of: if the transfer behavior of the receiving application is to post a receive buffer exceeding a threshold size when the receiving application is informed that a data block is available to be sent: switching the data transfer mode to a small-receive-large-receive transfer mode and if the data transfer mode is a small-receive-large-receive transfer mode: transferring subsequent data blocks having sizes greater than the threshold size in a small-receive-large-receive transfer mode. However, Scott, in the same field of controlling data transfer endeavor, discloses large receive and small receive buffering mechanism [see Scott, Col. 9, Lines 6-41]. It would have been obvious to one of ordinary skill in the art at the time of the invention was made to incorporate the teaching of Scott into the teaching of Kompella in order to regulate the network traffic by efficiently controlling the packet rate transfer depending the types of transfer behavior.

Regarding claims 9-11, Kompella does not explicitly teach the step of detecting the transfer behavior comprises the step of detecting if the receiving application posts receive buffers smaller than a threshold size when the receiving application receives a transfer request or when the receiving application is informed that said each data block is available to be sent and the step of switching the data transfer mode to a small-

receive transfer mode if the transfer behavior is that the receiving application posting receive buffers smaller than the threshold size when the receiving application receives the transfer request or when the receiving application is informed that said each data block is available to be sent and the step of sending the data in a plurality of messages, each message having a portion of the data for each subsequent data block, if the transfer mode is the small-receive transfer mode. However, Scott, in the same field of controlling data transfer endeavor, discloses large receive and small receive buffering mechanism [see Scott, Col. 8, Line 20 to Col. 9, Line 41]. It would have been obvious to one of ordinary skill in the art at the time of the invention was made to incorporate the teaching of Scott into the teaching of Kompella in order to regulate the network traffic by efficiently controlling the packet rate transfer depending the types of transfer behavior.

Regarding claims 17-18, Kompella does not explicitly teach the step of switching the data transfer mode comprises the step of switching the data transfer mode to small receive mode if the transfer behavior is that the initial data block and the subsequent data block has not been transferred within the predetermined time and the step of transferring one of the initial data block and the subsequent data block in messages if the data transfer mode has been switched to small receive mode, each message containing a portion of one of the initial data block and the subsequent data block. However, Scott, in the same field of controlling data transfer endeavor, discloses large receive and small receive buffering mechanism [see Scott, Col. 8; Line 20 to Col. 9, Line 41]. It would have been obvious to one of ordinary skill in the art at the time of the

invention was made to incorporate the teaching of Scott into the teaching of Kompella in order to regulate the network traffic by efficiently controlling the packet rate transfer depending the types of transfer behavior.

Claims 25-26 are rejected under the same rationale set forth above to claims 7-8.

Claims 27 and 33-34 are rejected under the same rationale set forth above to claims 9-11.

Claims 36-37 are rejected under the same rationale set forth above to claims 17-18.

Allowable Subject Matter

7. Claims 3-6 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Claims 12-15 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Claims 21-24 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Claims 28-32 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

8. Applicant's arguments with respect to claims 1-37 have been considered but are moot in view of the new ground(s) of rejection.

Other References Cited

9. The following references cited by the examiner but not relied upon are considered pertinent to applicant's disclosure.

A) Kompella et al, U.S. Pat. No. 5,892,754.

B) Bach et al, U.S. Pat. No. 5,619,650.

C) Loewenstein et al, U.S. Pat. No. 6,141,692.

10. A SHORTENED STATUTORY PERIOD FOR RESPONSE TO THIS ACTION IS SET TO EXPIRE THREE MONTHS, OR THIRTY DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION. FAILURE TO RESPOND WITHIN THE PERIOD FOR RESPONSE WILL CAUSE THE APPLICATION TO BECOME ABANDONED (35 U.S.C. § 133). EXTENSIONS OF TIME MAY BE OBTAINED UNDER THE PROVISIONS OF 37 CAR 1.136(A).

11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Philip Tran whose telephone number is (571) 272-3991. The Group fax phone number is (703) 872-9306. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ario Etienne, can be reached on (571) 272-4001.

12. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Philip Tran

Philip B. Tran
Art Unit 2155
June 03, 2005